# No. 9748

# In the United States Circuit Court of Appeals for the Ninth Circuit

COUNTY OF ALAMEDA (A BODY CORPORATE AND POLITIC, AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA), APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

## APPELLANT'S REPLY BRIEF



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### APPELLANT'S REPLY BRIEF

#### FACTS

This Honorable Court is respectfully referred to appellant's brief (12-16) for an accurate and complete Statement of Facts. Appellant will briefly refer to the following inaccuracies in the Facts set forth in appellee's brief.

1. Appellee states (3) ". . the County *offered to accept* responsibility to maintain, repair and replace the bridges . ." whereas the 1909 Resolution provided ". . that the County of Alameda . . *agrees to accept* said bridges . ." (R. 168).

2. The conclusion of law "and the canal was opened to navigation" (Appellee's Br. 3) is discussed in Section I of this brief (2-4). The record definitely contradicts the appellee's statement (3) that the electrical machinery was installed, harbor lines established, or a twenty-five-foot strip of land on either side of the Canal was made available to property owners *in accordance with the offer of the county*. There was no mention of harbor lines nor of a twenty-five-foot strip of land in the 1910 License (R. 170-172) or in the 1913 Resolution (R. 172-176), accepting the bridges *subject to the conditions and provisions of the* 1910 *License*. If the 1909 Resolution were an offer, then the 1910 License was a counteroffer because Conditions 1, 2, 4 and 5 of said License were entirely different from those of the 1909 Resolution. The establishment of pierhead and bulkhead lines and the granting of a revocable permission

(which was revoked about 1929 [R. 446]) to adjacent property owners to construct open-work, non-permanent structures in the area between said lines did not make available to such property owners a *twenty-five-foot strip of land* bordering each side of the Canal (R. 391, 440, 441). The establishment of harbor lines along the Tidal Canal was part of a general plan for the development of the entire San Francisco Bay area (R. 418, 441) and was for the protection of the navigable waters (R. 447) and was not consideration for the alleged contract. There is no evidence of any lease of any land after 1913 (R. 426).

3. The record does not show that federal aid was used to replace Park and High Street Bridges but it does show that the parties agreed that the arrangements under which these bridges were reconstructed and are now operated were of no significance to the present case (R. 135, 323, 331).

## ARGUMENT

### I

### THE CANAL WAS OPEN TO NAVIGATION PRIOR TO 1913.

The finding of fact that in 1913 the United States opened the Tidal Canal to navigation is neither correct nor material. Prior to 1913 both the United States and private interests upon occasions opened and closed the bridges across the Tidal Canal for the passage of vessels. Boats, barges and scows plied up and down said canal (R. 251). The frequency of the "occasions" when the bridges were opened is immaterial since continuity of use does not determine navigability as a matter of law. [1] Fourteen authenticated instances of use in a century and a half have been held to be sufficient to establish the navigability of a stream. [2] In the instant case the Tidal Canal was eight to ten feet in depth and there was a clearance of twelve feet eight inches below the Fruitvale Avenue Bridge for the passage of vessels prior to 1909 (R. 131, 165, 250, 251).

1. **United States v. Appalachian Electric Power Co.,** 85 L. Ed. 201, 209.
2. **Economy Light and Power Co. v. United States,** (C.C.A. 7th) 256 Fed. 792, 797, 798, aff. 256 U. S. 113, 65 L. Ed. 847, 41 Sup. Ct. 409.

The Supreme Court has held that a lake three to six feet deep was navigable. [3] The particular mode of use, whether by steamboat, sailing vessel or flatboat, does not determine the fact of navigability. [4]

Nor is the presence of an artificial obstruction such as a bridge which can be abated sufficient to prevent the stream's being navigable in law if it would be navigable in fact in its natural state. [5] The agreed facts are sufficient to establish the navigability of the Tidal Canal prior to 1913 within the generally accepted definition of navigability as set forth in *The Daniel Ball.* [6] The endorsement on the Title Sheet (R. 379) states "this permission (to occupy the lands between the pierhead and bulkhead lines) is revocable at any time when this area may be *again* required for purposes of navigation." (Emphasis added.) The United States Supreme Court, in holding navigable a river along portions of which there were only isolated bits of boating and where it was necessary to pull or push the boat more than a mile and a quarter, recently defined navigable waters as those "which either in their natural or *improved* condition" are used or are *suitable for use,* even though such improvements were not actually completed or even authorized.[7] If the Tidal Canal were made navigable merely by opening and closing the Fruitvale Avenue Bridge at more frequent intervals, and this is the only evidence in the record of any improvement of the Canal, then the Canal was certainly navigable prior to 1913 within the foregoing rule.

Since neither the 1909 Resolution, the 1910 License nor the 1913 Resolution suggested that the opening of the Canal to navigation was the consideration for the county's assuming the cost of operating, maintaining, repairing or replacing the bridges, the fact, if it were a fact, that the

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3. **United States v. Holt State Bank,** 270 U. S. 49, 56, 70 L. Ed. 465, 46 Sup. Ct. 197; see also **Welder v. State,** (Tex.) 196 S. W. 868, 873.
4. **United States v. Holt State Bank, supra; Schermerhorn v. Dozier,** (C. C. A. 4th 1918) 251 Fed. 839, 841, 842.
5. **Economy Light and Power Co. v. United States, supra.**
6. 10 Wall 557, 563, 19 L. Ed. 999, 1001.
7. **United States v. Appalachian Electric Power Co.,** 85 L. Ed. 201, 212, 213.

Canal was not open to navigation prior to 1913, is immaterial. The only reference to the Canal's not being open to navigation is a recital in the 1909 Resolution, which recital forms no part of the contract. [8]

The record does not set forth what was done to "open the Canal to navigation." Since the only thing done or purported to be done to lessen the obstruction to navigation which a slowly opening bridge necessarily caused, was done by Alameda County's maintaining the necessary number of bridge tenders to promptly open and close the bridges (Condition 5, License, R. 218), if either party "opened the Canal to navigation" then the County of Alameda did so and not the United States Government. The Government's only contribution to the navigability of the Tidal Canal was granting to the county a revocable license to operate the bridges. Therefore, a finding that the Canal was or was not open to navigation prior to 1913 does not lend any additional support to the government's claim that it has furnished adequate consideration for the promise of the county to operate and maintain the bridges.

## II

## THE COUNTY OF ALAMEDA DID NOT ENTER INTO A VALID, BINDING CONTRACT TO OPERATE AND MAINTAIN THE FRUITVALE AVENUE BRIDGE.

### (A) The License Was Not an Acceptance of Any Offer of the County of Alameda Contained in the Resolution of 1909.

On pages 85 to 87 of its brief appellant has set forth the reasons why the License of 1910 was not an acceptance of an offer of the County of Alameda to operate the bridges contained in the 1909 Resolution. By the 1909 Resolution the county *agreed to accept* the bridges provided they were placed in such condition and repair by the Government that they might be operated by electricity and provided, further, that the United States should, under such terms and condi-

8. **Ross v. Ross,** 233 App. Div. 626, 253 N. Y. Supp. 871, 882; **Jones v. City of Paducah,** 283 Ky. 628, 142 S. W. (2d) 365, 367; **Simpson v. Anderson,** (N. J.) 70 Atl. 696, 698.
The appellee concedes that a recital is no part of the contract in discussing the Rivers and Harbors Act set forth in the 1910 License (Appellee's Br. 36, 37).

tions as it saw fit, lease the waterfront of the Tidal Canal and establish harbor lines. The 1910 License made no reference to the establishment of harbor lines nor the leasing of the waterfront, but stated that the License was granted subject to five conditions, only the third of which, to-wit, the electrification of the bridges, was the same condition as in the 1909 Resolution. Space does not permit discussion of Conditions 1, 2, 4 and 5 in detail, but the Court's attention is directed to each of these conditions (R. 171, 172) and to the variance between the conditions contained in the License and those contained in the 1909 Resolution (R. 167-169). The 1913 Resolution (R. 172-176) reiterates the conditions subject to which the License was granted, refers to the fact that the United States has furnished and installed electrical machinery under the *"new conditions* as required by paragraph 3 of said License," (R. 175) and provides that the Board of Supervisors does accept and assume control of the three bridges *subject to the conditions and provisions of the aforesaid License of* 1910 (R. 175). The appellant, therefore, submits that the License was not an acceptance of the offer, if any, made by the County of Alameda in 1909, and that if the negotiations between the United States Government and the County of Alameda between the years 1909 and 1913 constitute any contract, even though a void or voidable one, then the 1910 License must be considered as a counteroffer.

**(B) The County of Alameda Has Not Now and Never Has Had the Authority to Operate and Maintain the Fruitvale Avenue Bridge.**

The appellee in its brief (9) concedes that counties cannot act beyond the *express* or *implied* powers granted by their charters or by legislative acts. Since appellee can find no *express* power whatsoever whereby the county was, or is, authorized to enter into or perform the alleged contract in question, it is forced to search for an *implied* power

concealed in some power expressly granted by such charter or legislative act.

Of the multitude of statutes in California concerning county highways and bridges, this quest has resulted in appellee's citing only section 32 of the Charter of Alameda County (Appellee's Br. 10). Appellee relies solely upon this section to convince this Court that the County of Alameda was *impliedly* empowered to enter into the purported contract. Since section 72 of said Charter provides that "This Charter shall take effect immediately upon its approval by the Legislature" and since such approval did not occur until January 18, 1927,[1] said section 32 was not even in existence until at least fourteen years subsequent to the time said contract is alleged to have been executed.

Since appellee has conceded that counties cannot act beyond *express* or *implied* powers granted by charter or by legislative act, and since the appellee has cited no *express* or *implied* power so granted whereby the county was authorized to enter into said contract, it is respectfully submitted that it must be conceded and held that such contract was clearly *ultra vires* and void.

It is furthermore submitted that even had section 32 been in existence in 1909 or 1913 the power to operate, maintain, repair and replace the Fruitvale Avenue Bridge could not be implied even from the strained construction placed on said section by the appellee. Since said section, so far as pertinent here, merely provides in the most general terms that *the County Surveyor,* under regulations of the Board of Supervisors, shall "have direction and control over all work construction, maintenance, and repair of roads, . . . and bridges," it is submitted that it cannot be reasonably implied, or implied at all, that *the Board of Supervisors* of the county was thereby granted the power to forever bind the County of Alameda to operate, main-

1. Cal. Stats., 1927, Concurrent and Joint Resolutions and Constitutional Amendments, Ch. 10, p. 2029, filed with Secretary of State January 18, 1927.

tain, repair and when necessary rebuild a combination railroad, vehicular and pedestrian bridge belonging to the United States, located on and over land belonging to the United States, under an alleged agreement expressly and solely revocable at the will of the Secretary of War.

The appellee states in its brief (11) that "the authorities cited by the appellant are not in point since all of them deal with situations where the county was clearly acting outside of the scope of any express or implied authority." The appellant has cited and discussed numerous decisions wherein courts have held various powers not to have been implied in certain legislative acts where such power might more reasonably have been implied than could the power of the county to enter into the contract in question be implied from the general language contained in said section 32. For example, the statutory authority of a board of supervisors to "lay out, maintain, control and manage public roads, ferries and bridges within the county" has been held not to empower a county to spend its funds on a federal road, [2] and a legislative act authorizing the City of Oakland to construct a bridge across the estuary was held not to authorize the city to construct a bridge on private land. [3] Nor has the appellee cited a single decision in support of its contention that the implied power alleged to be vested in the county by virtue of said section 32 impliedly empowered the county to execute the alleged contract.

In answer to appellee's quotation from 1 Dillon on *Municipal Corporations,* page 452 (Appellee's Br. 11) appellant refers to the following language therefrom:

> ". . . Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied . . ." [4]

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2. **Board of Sup'rs of Apache County v. Udall,** 38 Ariz. 497, 506-509, 1 P. (2d) 343, 347, 348.
3. **Pacific Bridge Co. v. Kirkham,** 54 Cal. 558, 560.
4. 1 **Dillon on Municipal Corporations,** (5th Ed.), Sec. 237, pp. 449, 450.

Section 32 cannot reasonably be construed to contain the implied power as urged by the appellee. However, assuming, for the sake of argument only, that there is any "doubt" concerning the existence of such implied power then such power must be denied.[5]

Appellee's statements concerning the operation and maintenance of the High and Park Street Bridges (Appellee's Br. 12) are in direct violation of the oral (R. 323, 331) and written (R. 135) agreement between the parties hereto. Furthermore, since this action involves *solely* the Fruitvale Avenue Bridge, it is difficult to see what significance can be attached to appellant's operating *two other bridges* "under other arrangements."

## III

## CONGRESS HAS NOT NOW AND NEVER HAS HAD POWER TO AUTHORIZE THE COUNTY OF ALAMEDA TO MAINTAIN THE FRUITVALE AVENUE BRIDGE.

The appellee has failed to cite any authorities in answer to the appellant's contention that Congress has not now and never has had the power to authorize the County of Alameda to maintain the Fruitvale Avenue Bridge (Appellant's Br. 75-80). The excerpt on page 12 of appellee's brief supposedly from the case of *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, does not appear in that case but does appear in a footnote on page 1603 of 3 Dillon, *Municipal Corporations* (5th Ed.), for the limited proposition that the United States Government has the power of eminent domain which it may exercise either directly or through a corporation created for that purpose.

In the two other cases cited by appellee in this section of its brief [1] the City of St. Louis already possessed the statutory power to build the bridge in question and Congress merely extended to it the *privilege*, not the *power*,

5. 20 Corpus Juris Secundum, **Counties**, Sec. 82, p. 852 (see also 15 Corpus Juris, **Counties**, Sec. 103, p. 458); 18 Cal. Juris., **Municipal Corporations**, Sec. 107, p. 801; 43 Corpus Juris, **Municipal Corporations**, Sec. 192, pp. 195, 196.

1. **Haeussler v. St. Louis**, 205 Mo. 656, 103 S. W. 1034; **Latinette v. City of St. Louis**, (C.C.A. 7th 1912) 201 Fed. 676.

of eminent domain which provided the *means* for the exercise of that existing power. So in the instant case although Congress could grant to the county a license to operate the Fruitvale Avenue Bridge over navigable waters of the United States, such license did not empower the county to do so in the absence of a grant of such power by charter or the legislature of the state. A municipal corporation such as a county derives none of its powers from the United States. It is a creature of the state in which it exists and has only such powers as the state has given it. [2]

The Government removed one obstacle to the county's temporarily assuming control of the bridges across navigable waters by the granting of a revocable license, but it could not and did not empower the county to expend the taxpayers' money to operate, maintain, repair and replace the Fruitvale Avenue Bridge for all future time.

## IV

### THE EXPENDITURES MADE BY THE COUNTY TO OPERATE AND MAINTAIN THE FRUITVALE AVENUE BRIDGE WERE GIFTS TO A PRIVATE CORPORATION OR THE UNITED STATES OF PUBLIC MONEY PROHIBITED BY SECTION 31 OF ARTICLE IV OF THE CALIFORNIA CONSTITUTION, AND WERE IN VIOLATION OF THE "DUE PROCESS" CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Appellee in its brief (16, 17) contends that since the contract is between the county and the United States, the county moneys expended on the Fruitvale Avenue Bridge are not a gift to a private railroad corporation but were expended in compliance with the contract between the county and the United States. However, this is precisely what the decisions discussed by appellant in its brief (42-52) hold to be illegal as trying to accomplish indirectly what cannot be done directly. If it were otherwise any such alleged license agreement involving *"the evils which the constitutional restriction was designed to prevent"* would afford *"a ready means of accomplishing by indirection what could not be*

2. **Arkansas-Missouri Power Co. v. City of Kennett** (C.C.A. 8th 1935) 78 Fed. (2d) 911, 922.

*done openly and avowedly."*[1] The appellee cites no decision to the contrary or in support of its contention.

Furthermore, the expenditure of county funds for the *benefit* received by a *private* railroad corporation is clearly the use or diversion of public funds for a *private purpose* as distinguished from a *public purpose* regardless of the means adopted to accomplish such purpose.

The appellee in its brief (18) states that due to the alleged omission of the 1909 Resolution the court in *County of Alameda* v. *Ross,*[2] was misled into concluding that

> "The installation of electrical apparatus by the Government for the opening and closing of the drawbridges, *under the terms of the License prior to its execution.* (Italics supplied.)

did not furnish an independent consideration."

This is an absolute misstatement of the court's holding, as shown by the following actual quotation (from which appellee only quoted the portion best suited for its purpose):

> *"There is no merit in the petitioner's contention* that the installation of electrical apparatus by the government for the opening and closing of the drawbridges, under the terms of the license prior to its execution, furnishes an independent consideration which makes the agreement binding. It still lacks mutuality." (Emphasis added.)[3]

It is submitted that the 1909 Resolution was not "the key fact in the situation" and it was wholly immaterial whether the said court in *County of Alameda* v. *Ross, supra,* had said Resolution before it since the fact would obviously remain that the expenditure of county funds on said bridge is for the *benefit* of a *private* railroad corporation. While true that the United States was not a party to said action, nevertheless it was notified of the filing of said

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1. **Higgins v. San Diego Water Co.,** 118 Cal. 524, 546, 547, 45 Pac. 824, 828, 829, 50 Pac. 670.
2. 32 Cal. App. (2d) 135, 89 P. (2d) 460.
3. 32 Cal. App. (2d) 135, 146, 89 P. (2d) 460, 465.

action and the United States Attorney in San Francisco received copies of all papers filed therein during the proceedings and before the case was submitted (R. 142).

Appellee made no reply whatever to appellant's contentions and authorities to the effect that such an expenditure of county funds in aid of a *private* railroad corporation violated the "due process" clause of the Constitution (Appellant's Br. 50, 51) or that said alleged contract was void as providing for an unconstitutional gift to the United States (Appellant's Br. 52-54).

## V

## THE ALLEGED CONTRACT VIOLATES SECTION 18 OF ARTICLE XI OF THE CONSTITUTION OF CALIFORNIA FORBIDDING A COUNTY TO INCUR ANY INDEBTEDNESS EXCEEDING IN ANY YEAR THE INCOME AND REVENUE PROVIDED FOR SUCH YEAR and

## VI

## THE ALLEGED CONTRACT IS VOID FOR LACK OF MUTUALITY.

Appellee's answers to appellant's contentions that the conclusions of law, first, that the alleged contract did not violate Section 18 of Article XI of the Constitution of California, and, second, that said alleged contract was not void for lack of mutuality, were erroneous, will be discussed together for the reason that under the facts of this case both conclusions of law cannot be correct. To contend that the alleged contract was valid on the ground that it did not violate Section 18 of Article XI of the Constitution because the promise of the county to operate, maintain, repair and replace the Fruitvale Avenue Bridge was in consideration of the use and occupation of the Bridge is to admit that the alleged contract is void because the license was expressly revocable at the will of the Government. To claim that the consideration for the alleged contract was the electrification of the bridges, so as to escape the consequences of lack of mutuality, is to admit that the consideration was executed prior to 1913, that the county then and there became obligated for all time to operate, maintain, repair and replace

the Fruitvale Avenue Bridge, the time of payment only being postponed, and that the said contract therefore violated Section 18 of Article XI of the Constitution.

The appellant challenges the following statement of the appellee (Appellee's Br. 21):

> "In other words, it is agreed that in no one year did the county become obligated beyond the constitutional limits."

The Agreed Statement of Fact reads:

> "The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto. . . ." (R. 137.)

Whether the county became obligated beyond the constitutional limit in any one year is the question before this Court, the very crux of this entire law suit. If it did, the alleged contract was void because it violated Section 18 of Article XI of the Constitution (Appellant's Br. 29-41). If it did not, the alleged contract is void for lack of mutuality (Appellant's Br. 85-95).

On page 25 of its brief, in order to avoid the inevitable conclusion that the contract was void because it imposed upon the county a liability in excess of the income and revenue for the year 1913-14 which would follow if the electrification of the bridges were the consideration for its execution, the appellee stated:

> "It is submitted that the contract between the County and the United States is valid because each year's expense is within the County's income, and the expense incurred each year is *in consideration of the occupation and use of the bridge by the County for such year.*" (Emphasis added.)

On page 27 of its brief in support of the proposition that the alleged contract is not void for lack of mutuality the appellee stated:

> "It is the position of the appellee that a fair and reasonable interpretation of the Resolution of 1909, License of 1910, and its *acceptance* by the Resolution of 1913, leads to the conclusion that *electrification of the bridge by the United States at the request of the county was the consideration for the promise by the county to thereafter operate and maintain it.*" (Emphasis added.)

The appellee next argues that if appellant's contention is correct that the control of the bridges was the consideration for the promise of the county to maintain and operate the same, then the contract can be sustained on the theory that it was a unilateral contract which ripened into a binding obligation upon performance by the United States, to-wit, "the turning it over to the County" (Appellee's Br. 30). Whereas a unilateral contract originally lacking mutuality may become binding upon its complete execution, such a rule of law would not apply where the consideration was a continuing license, and where the offeror at all times retained the right to revoke or terminate the same. Such revocable control could furnish no consideration for either a bilateral or a unilateral contract.

The appellee states on page 27 that "the fact that there was a second or subsidiary consideration in the form of a license authorizing the county to operate the bridge did not destroy the mutuality of the contract." This argument is fallacious. If the county became bound upon the electrification of the bridges, then the alleged contract was void from the beginning because it violated Section 18 of Article XI of the Constitution, and a revocable license, which alone could never have supported a valid contract, could not have validated a void one.

On page 35 of its brief appellee states:

> "It is submitted that such an interpretation (that the contract is to remain in force so long as the Secretary of War does not revoke it) would work no

> hardship on the County since the obligation of the County would cease immediately that the license was revoked. . . ."

This is clearly an admission that the license was the consideration for the alleged contract, and that said contract was lacking in mutuality.

## VII

### THE ALLEGED CONTRACT IS VOID FOR UNCERTAINTY.

#### (A) The Alleged Contract Is Void for Uncertainty Because the License Is Revocable at the Will of the United States Government.

The appellant's argument that the alleged contract was void for uncertainty is not answered by the appellee's contention that it is not to be presumed that the parties meant to do a "vain and meaningless thing" (Appellee's Br. 33). The intent of the parties was to do exactly what the appellee admits they did—enter into a license agreement which was "to remain in force so long as the Secretary of War does not, in the exercise of its general powers, revoke the license" (Appellee's Br. 35). Under such an agreement, however, both parties have the privilege of revocation (Appellant's Br. 85-95).

The cases cited by appellee for the proposition that the fact that the contract does not provide for a definite time for its termination does not render it void for uncertainty do not support its argument. In *Noble* v. *Reid-Avery Co.*,[1] not the will or whim of the promisor, but some external condition or standard beyond his control determined the time for which the contract was to continue. In *Sutliff* v. *Seidenberg, et al,*[2] an action to recover for services already rendered, the indefiniteness of the duration of the contract was not even discussed.

In the instant case the grantor of the license, the United States Government, had the *exclusive* power to continue or terminate the license even had the contract not expressly so provided (Appellee's Br. 37). Attention is called to the

1. 89 Cal. App. 75, 64 Pac. 341.
2. 132 Cal. 63, 64 Pac. 131.

cases cited in appellant's brief (95-101), and particularly to the quotation from Williston to the effect that "one of the commonest kinds of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance." [3] In view of the "paramount power" (Appellee's Br. 38) of the United States over navigable waters, it is submitted that a grant of a revocable license to construct or operate a bridge over such waters, would never be a sufficient consideration for a valid contract.

**(B) The Alleged Contract Is Void for Ambiguity.**

The fact that the provision in the license that the bridge should be under the supervision of the Engineer District amounts to nothing more than a statement of the law, since Congress always had power to supervise bridges over navigable waterways, does not cure the ambiguity of its terms, but rather substantiates the appellant's claim that the *degree* of control of the bridges, if any, which was granted to the County of Alameda was so uncertain and illusory as to be insufficient to serve as a consideration for the alleged contract here sought to have specifically performed.

## VIII

## THE COUNTY IS NOT ESTOPPED TO SET ASIDE THE ALLEGED CONTRACT TO MAINTAIN, OPERATE, REPAIR AND REBUILD THE FRUITVALE AVENUE BRIDGE.

On page 40 of its brief appellee states, "It is true that a county may not be estopped unless it was acting within the scope of its authorities . . ." The appellant submits that the county was not acting within the scope of its authority for the following reasons:

1. The county does not possess the express or implied power to operate, maintain, repair and replace a bridge owned by the United States Government, crossing navigable waters, for the benefit of the Government and a private railroad corporation (Appellant's Br. 16-29, Appellant's Reply Br. 5-8).

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3. 1 Williston, **Contracts** (Rev. Ed. 1936), Sec. 43, p. 123.

2. Section 18 of Article XI of the California Constitution expressly prohibits said county from incurring the liability contemplated under said alleged contract, which was in excess of the income for the year 1913-14 or any year prior thereto (Appellant's Br. 29-41, Appellant's Reply Br. 11-14).

3. Section 31 of Article IV of the California Constitution and the "due process" clause of the United States Constitution prohibit the county from making such a gift of its tax moneys to a *private* railroad corporation or to the United States (Appellant's Br. 42-54, Appellant's Reply Br. 9-11).

4. The said county and its board of supervisors were prohibited from entering into a perpetual contract (Appellant's Br. 54-75, Appellant's Reply Br. 19-20).

In the case of *County of Sacramento* v. *Southern Pacific Co.*,[1] the county was not without the power to execute the contract nor was it void because it conflicted with any statutory law of the state or because it was contrary to public policy.[2] Furthermore, in that case where the county sought to recover back money already paid, it did not have to meet the various equitable defenses which Alameda County may urge against the specific performance of the contract here sought to be enforced.

The appellee's reference to the "benefits" of the improvements made by the United States and the "valuable property rights" given up by the Government (Appellee's Br. 39, 40) finds no support in the record. The Resolution of 1913 merely recited that the United States had performed all the things required by it to be performed *under the terms of the license* (R. 221). Neither the License nor the Resolution of 1913 made any mention of establish-

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1. 127 Cal. 217, 59 Pac. 568.
2. Cases distinguishing **County of Sacramento v. Southern Pacific Co., supra,** are **County of Tehama v. Sisson,** 152 Cal. 167, 177, 92 Pac. 64, 69; **Reams v. Cooley,** 171 Cal. 150, 153, 152 Pac. 293, 294; **County of Shasta v. Moody,** 90 Cal. App. 519, 523, 265 Pac. 1032, 1034; **County of Marin v. Messner,** 44 A.C.A. 626, 639.

ing harbor lines or making available the land along the Canal. So far as either of these things were done, they were gratuitous acts on the part of the Government, revocable at will, which extended to the entire Bay Area (R. 418, 441) and were an exercise of its power over inter-state commerce.[3] There is no evidence of any leasing subsequent to 1913 (R. 425-427, 442). The electrification of the bridges was the only improvement made by the Government other than the drawing of some pierhead and bulkhead lines on a map based on a survey made in the eighteen-seventies (R. 417, 418) and the extending to the county of a revocable permission (which actually was revoked about 1929 [R. 444, 446]) to erect open-work, non-permanent structures between the pierhead and bulkhead lines.

When the appellee speaks of the "benefits" (Appellee's Br. 42) the county has enjoyed, it loses sight of the fact that the Government expended $21,358.80 for the electrification of the bridges and thereby shifted to the county its legal obligation of maintaining the bridges from July 1, 1913, to July 1, 1939, at a cost of $703,066.45. If the equities were balanced the Government would be found to have been repaid some thirty-three times from 1913 to 1939. Since the Government was bound by the *Crooks* decree (R. 19-23) to maintain "suitable" bridges the appellee must concede that at some time between 1913 and the present time the Fruitvale Avenue Bridge would have become obsolete and would have had to be electrified, repaired and eventually replaced. By granting a revocable license to use the land between the pierhead and bulkhead lines the United States gave up no property rights, certainly not "valuable" ones.

3. Article I, Section 8, Clause 3, United States Constitution.

## IX

### THE UNITED STATES DISTRICT COURT SHOULD HAVE CONCLUDED THAT THE DECISION IN COUNTY OF ALAMEDA v. ROSS,[1] INTERPRETING THE STATUTES, CONSTITUTIONAL PROVISIONS AND CASE LAW OF CALIFORNIA WAS BINDING UPON SAID DISTRICT COURT.

The District Court should have concluded as a matter of law that the decision of *County of Alameda* v. *Ross*[2] interpreting the statutes, constitutional provisions and case law of California in regard to the powers of boards of supervisors and counties therein was binding upon said District Court in the present action. The appellee urges that the case of *Erie Railroad Co.* v. *Tompkins*[3] does not apply to cases involving federal questions and that the instant case is of that type. A "federal question" is one arising under the treaties, federal statutes or Constitution,[4] and the fact that the United States is a party does not necessarily mean that a federal question is involved.

The appellee cites *Byron Jackson Co.* v. *United States*,[5] for the proposition that the rule of the *Erie Railroad Co.* case does not apply to an action on a contract where the United States government is the defendant (Appellee's Br. 45, 46). It is not established that the rule of the *Byron Jackson Co.* case correctly states the present law since other United States District Courts, in one instance in a later case[6] and the United States Circuit Court[7] in a case involving contract law, have applied the rule of the *Erie Railroad Co.* case to cases where the United States was a party.

Whether the rule of the *Byron Jackson Co.* case is correct is immaterial since on all questions involving general law such as lack of mutuality, perpetual contracts and estoppel, the law of the federal courts agrees with that of the

1. 32 Cal. App. (2d) 135, 89 P. (2d) 460.
2. Ibid.
3. 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817.
4. **White Swan Mines v. Balliet,** (C.C.S.D. Iowa 1905) 134 Fed. 1004, 1005; **United States v. Douglas,** 18 S. E. 202, 113 N. C. 190.
5. (D. C. S. D. Cal. 1940) 35 Fed. Supp. 665.
6. **Carr v. United States** (D.C.W.D. Ky. 1939) 28 Fed. Supp. 236, 243; **United States v. Security-First National Bank of Los Angeles** (D.C.S.D. Cal. 1939) 30 Fed. Supp. 113, 119; **United States v. Rogers and Rogers** (D.C.D. Minn. 3rd 1941) 36 Fed. Supp. 79, 80.
7. **United States v. Brookridge Farm** (C.C.A. 10th 1940) 111 Fed. (2d) 461.

California courts, and since there is no question that the interpretation of the state courts of the constitution and statutory provisions concerning the existence and extent of the powers of political subdivisions of the state is controlling on the federal courts. Since Chief Justice Marshall laid down the rule that the construction given by the courts of the several states to the legislative acts of those states is received as true by the United States courts,[8] the federal courts have held that the judgment of state courts on such matters is conclusive.[9]

When the federal government enters into a contract with a private citizen its rights and obligations are governed by the same principles of law which are applicable to like contracts between individuals.[10] Appellant submits that the rules of law set forth in the case of *County of Alameda* v. *Ross,* are controlling in the federal courts because they reaffirm former interpretations of the statutory and constitutional provisions of the state defining and limiting the powers of a county therein, and because the decision is based upon general principles of law which are not only well established by the California courts but which are in perfect accord with the general law as set forth in the federal decisions. The case has the added value of presenting a set of facts identical with those now before this court, and the interpretation of state law in relation thereto.

## X

### FURTHER CONTENTIONS OF APPELLANT WHICH APPELLEE HAS NOT ANSWERED AND WHICH NECESSITATE A REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT.

The appellee completely neglected to attempt to answer the following sections of appellant's brief:

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8. **Elmendorf v. Taylor,** 10 Wheat 152, 158, 6 L. Ed. 289.

9. **Senn v. Tile Layers Protective Union,** 301 U. S. 468, 477, 57 Sup. Ct. 857, 861, 81 L. Ed. 1229; **Florida Power and Light Co. v. City of Miami** (C.C.A. 5th 1938) 98 Fed. (2d) 180, 182.

10. **Reading Steel Casting Co. v. United States,** 268 U. S. 186, 188, 45 Sup. Ct. 469, 69 L. Ed. 907; **United States v. National Exchange Bank,** 270 U. S. 527, 534, 46 Sup. Ct. 388, 70 L. Ed. 717; **Cory Bros. & Co. v. United States** (C.C.A. 2d 1931) 51 Fed. (2d) 1010, 1012.

IV

**The Court Erred in Not Concluding as a Matter of Law that the Alleged Contract Between the United States and the County of Alameda, Not Specifying Any Time for Which Said County Was Bound to Operate, Maintain, Repair and if Necessary, Rebuild the Fruitvale Avenue Bridge, Was Contrary to Public Policy and Void and/or Was Substantially Complied With After a Reasonable Time and/or Was Terminable at the Will of Either Party.**

X

**The Court Erred in Not Concluding as a Matter of Law that Equity Will not Decree Specific Performance of an alleged Contract Which Is Oppressive, Unjust and Unconscionable.**

The appellant discussed the matters set forth in Section IV and the proposition that a court of equity will not decree specific performance of a perpetual contract on pages 54 and 75 and Section X on pages 107 to 114 of its opening brief, citing a number of well established United States Supreme Court cases.

The rules of law and equity contained in either of the above sections, none of which have been or can be challenged by the appellee, are sufficient within themselves to warrant this Honorable Court's reversing the judgment of the United States District Court in the present action.

## CONCLUSION.

Appellant County of Alameda respectfully prays for a reversal of the erroneous and inequitable decree of the United States District Court and that its counterclaim and costs be allowed.

Dated: August 21, 1941.

Respectfully submitted,

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